UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
Before
The Honorable Susan A. Flynn, Administrative Law Judge

SALEM HOSPITAL CORPORATION, d/b/a MEMORIAL HOSPITAL OF SALEM COUNTY Respondent	)	
v.	)	Case No. 04-CA-130032
HEALTH PROFESSIONALS AND ALLIED EMPLOYEES, AFT / AFL-CIO Charging Party	)	

POST-HEARING BRIEF OF RESPONDENT

Respondent Salem Hospital Corporation d/b/a Memorial Hospital of Salem County ("Salem" or "the Hospital") hereby respectfully submits its Post-Hearing Brief to the Honorable Susan A. Flynn following a Hearing held in the above-captioned matter on December 1, 2014 at the National Labor Relations Board ("NLRB") Region Four in Philadelphia, Pennsylvania.

The Complaint alleges violation of Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, ("NLRA" or "the Act") as a result of the Hospital's failure to respond to Requests for Information and Demands to Bargain by the Charging Party, Health Professionals and Allied Employees, AFT/AFL-CIO ("HPAE" or "the Union"), concerning the Hospital's closure of its Inpatient Obstetrics Unit and transfer of its Healthstart program in May, 2014.

TABLE OF AUTHORITIES

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Background

Salem operates an acute-care center hospital in Salem, New Jersey. On or about May 19, 2010, HPAE filed a Petition for Certification of Representative ("Petition") with NLRB Region 4, seeking to represent a unit of all full-time, regular part-time, and per-diem Registered Nurses ("RNs") employed at the Hospital. At a hearing held at Region 4 from June 2, 2010 through June 9, 2010, the Hospital produced evidence to illustrate that a number of RNs who served as Charge Nurses should be excluded from the bargaining unit as supervisors. In addition, during the hearing, the Hospital filed an Unfair Labor Practice Charge, which alleged the Petition was unlawful due to "supervisory taint." Case No. 4-CB-10499. The Hospital's Charge was later dismissed.

On August 2, 2010, the Regional Director for Region Four concluded that, with the exception of two Charge Nurses working in the Surgical Services Unit, all of the Hospital's Charge Nurses were Staff Nurses and would be included in the bargaining unit. The Union prevailed in the Election held on September 1 and 2, 2010. On December 21, 2010 the Hospital filed Objections to the Election, which the Regional Director found to raise substantial and material issues of fact, and accordingly, scheduled a hearing on the entirety of the Objections on February 22, 2011. On March 23, 2011, Administrative Law Judge Earl Shamwell issued a Decision dismissing all of the Hospital's Objections. On April 6, 2011, the Hospital filed with the Board Exceptions to ALJ Shamwell's Decision, which the Board ultimately overruled. On August 3, 2011, the Board issued a Certification of Representative ("Certification") in favor of the Union as to the petitioned-for unit of RNs at the Hospital.

Your Honor has taken administrative notice of four other cases (T. 11-13),[1] all solely alleging the Hospital violated 8(a)(5) and (1) for failing to bargain and/or provide information to the Union. This includes the "testing of certification" proceeding initiated by the Hospital that is currently pending before the D.C. Circuit. Like the case at bar, the other alleged violations emanate from Salem's challenge of the validity of certification as the Hospital continues to operate in the ordinary course of business until the D.C. Circuit has ruled on the validity of the Certification. None of these cases allege any independent violations of Section 8(a)(1) or 8(a)(3) of the Act. The Hospital respectfully requests that Your Honor's administrative notice include the Records in those cases as well.

Summary of Proceedings

On June 4, 2014, HPAE filed an unfair labor practice charge alleging that the Hospital violated Section 8(a)(5) and (1) of the Act by failing to provide information to HPAE regarding the closure of the inpatient obstetrics unit at the Hospital and failing to bargain with HPAE about the effects of that decision.

On September 22, 2014, Mr. Dennis Walsh, as the Regional Director for Region Four of the NLRB, issued a Complaint and Notice of Hearing. The Complaint alleged the Hospital violated Section 8(a)(1) and (5) of the Act by failing and refusing to bargain with the Union concerning the effects of its decision to close the inpatient obstetrics unit and discontinue its Healthstart program. The Hospital filed an Answer and later an Amended Answer in which the

[1] Salem Hospital Corporation a/k/a the Memorial Hospital of Salem, 357 NLRB No. 119 (2011); 361 NLRB No. 61 (2013); 360 NLRB No. 95 (2014); 361 NLRB No. 110 (2014). Throughout this Brief, "GC. Ex." refers to Counsel for the General Counsel's Exhibits, and "T" refers to pages of the Transcript of Hearing held in this matter December 1, 2014.

Hospital denied the material allegations of the Complaint and averred various affirmative defenses.

On November 19, 2014, Mr. David Faye, Counsel for the General Counsel, issued a Subpoena *Ad Testificandum* and a Subpoena *Duces Tecum* on the Hospital's custodian of records. The subpoenas demanded extensive production of documents relating to the Hospital's decision to close the inpatient obstetrics unit. The Hospital fully complied with these subpoenas.

On December 1, 2014, a Hearing was held on the Complaint before Your Honor. At the conclusion of Hearing on that day, Your Honor left the Record open to receive a request by the Undersigned Counsel for Subpoenas and possible further testimony.

On December 2, 2014, the Hospital requested the issuance of one Subpoena *Ad Testificandum* and one Subpoena *Duces Tecum*. Upon receipt of the Subpoenas, the Hospital served both upon HPAE, seeking testimony and documents that would identify the various sources of notice and information the Union had received concerning the inpatient obstetrics unit and/or the Healthstart Program at the Hospital.

On December 22, 2014, HPAE filed a Petition to Revoke the Subpoenas served by the Hospital, claiming that the Hospital sought irrelevant information, or alternatively, that the Hospital sought confidential/privileged information protected by the attorney work product doctrine and a labor relations privilege. On that same date HPAE also filed a Motion to Close the Record and Set a Briefing Schedule, and for an Award of Litigation Costs.

On January 2, 2015, Your Honor granted HPAE's Petition to Revoke the Subpoenas, finding that the requested documents were not relevant to the resolution of the issues in the case. By the same order, Your Honor closed the record in the case and canceled the tentative January 21, 2015 date to reconvene to take testimony pursuant to the Hospital's subpoenas.

On January 2, 2015, after receiving the Order Granting Petition to Revoke and Closing the Record, the Hospital sought clarification of the Order, which did not affirmatively grant or deny HPAE's request for litigation costs. Later that same day, Your Honor issued a Revised Order Granting Petition to Revoke and Closing the Record, which delayed a ruling on HPAE's request for litigation costs, noting that consideration of the issue, if appropriate, would be made as part of the Your Honor's decision on the merits of the case.

Summary of Facts

By letter dated August 17, 2011, the Hospital's then interim CEO, Richard Grogan, advised the Union that Salem was challenging the Board's certification of the Union and therefore would not be bargaining with the Union. (T. 19, GC Ex. 2).

The parties have stipulated that on or about May 31, 2014 the Hospital closed its inpatient obstetrics unit. (T. 8). The parties also stipulated that effective with the date of closure, six Hospital employees were reassigned or transferred to other units in the employer's facility and six other employees were terminated. (T. 8). The Hospital did not bargain or provide information to the Union due to the Hospital's pending challenges to the Union's certification, which have been identified among the affirmative defenses put forth by the Hospital with respect to this case. (T. 14). Primary elements in the Hospital's challenge of the validity of the certification arise from the facts that the certified collective bargaining unit includes supervisory employees, and that those supervisory employees engaged in conduct which tainted the election. (T. 15, 65).

The General Counsel's only witness, Frederick DeLuca, testified that on or about January 15, 2014, the Union became aware, through information supplied by unknown Hospital

employees, of the Hospital's intent to close the inpatient obstetrics unit and discontinue its Healthstart program. (T. 36-38). The Union confirmed this information by contacting the New Jersey Department of Health in early January 2014. (T. 37-38). On January 15, 2014 the Union submitted a request to bargain with the Hospital regarding the effects of the decision to close the inpatient obstetric unit and discontinuance of its Healthstart program and requested certain information related to the closure. This information included the names and records of RNs who would be affected by the closure and the Hospital's plan to deal with obstetric patients arriving at the Hospital in emergency situations. (T. 20-21). On April 9, 2014 the Union renewed its request to bargain with the Hospital concerning these effects and for the aforementioned information. (T. 25). On May 9, 2014, the Union again renewed the original request for information and expanded the request to include information regarding the Hospital's explanation for closing the unit, any and all correspondence sent to the bargaining unit RNs, and all documents reflecting the effects of the closure on unit RNs. (T. 6). The Hospital did not respond to any of these demands. (T. 14).

Summary of Argument

All elements of the Hospital's argument emanate from one fundamental premise: that is, that the Certification of the Union was not valid. Correspondingly, since the Union does not legitimately represent the Hospital's nurses, the Union is in no way entitled to notice by, receipt of information from, or bargaining with, the Hospital. The reasons underlying the Hospital's

premise are substantial, and presented elsewhere in more detail,[2] In addition to other procedural and substantive obstacles, the Certification violates the Act because the unlawfully certified collective bargaining unit includes supervisory employees and the supervisory employees were inappropriately involved in the Union's organizing campaign.

At Hearing, Salem's undersigned Counsel sought to determine the source of the information the Union had obtained regarding both the closure of the inpatient OB Unit and the transfer of the Healthstart program. By the testimony of the General Counsel's only witness, the Union had notice at least five months prior to the effective date of both actions. The notice came by way of a press release that may or may not have been delivered directly to the Union, the publication in the media of information contained in the press release, and additional information provided to Union employees other than Mr. DeLuca by unnamed Salem employees who might well be supervisory employees.

Against this backdrop, the Hospital submits that Your Honor erred in revoking the Subpoenas served by the Hospital on the Union, and further submits that any grant of litigation fees to the Union would be a travesty. In its Petition to Revoke the Subpoenas issued by the Respondent and Motion for Attorneys' Fees, HPAE accused the Hospital of dilatory tactics, frivolous litigation and abuse of process. Similarly, at Hearing, Counsel for the General Counsel accused the Hospital of seeking the subpoenas as a delaying tactic. Neither party's accusations have any merit. The Hospital had no idea the General Counsel would present a witness with no firsthand knowledge of the Union's source of notice and information. Given the nature of the Complaint's allegations, the relevance of notice and information cannot be challenged. Neither

[2] The individual bases for challenge of the Certification are set forth as Affirmative Defenses in the Respondent's Amended Answer, as well as in the records of the related cases of which Your Honor has taken administrative notice.

should the Hospital's legitimate effort to explore the sources of notice and information by subpoena be challenged. The subpoenas should not have been revoked, and the Union's hollow quest for litigation fees should be denied.

Finally, the Complaint should be dismissed because the Regional Director of Region Four had no authority to issue the Complaint, given his appointment by the Board at a time when it had no quorum in violation of Section 3(b) of the Act.

ARGUMENT

1. The Certification is Invalid and Therefore, the Hospital Had No Duty to Provide Information To, Or Bargain With, the Union.

The allegations set forth by the Complaint presume, of course, that Salem held a duty to recognize and bargain with the Union which, in turn, depends upon the validity of the Certification of Representative. However, based upon the affirmative defenses averred by the Amended Answer in the case at bar, and for the reasons explained in the previous cases of which Your Honor has taken administrative notice, the Certification is invalid. Consequently, for all of those reasons, Your Honor should dismiss the allegations in the case here.

2. The Complaint Should Be Dismissed Because the Regional Director of Region Four Lacked the Authority to Issue the Complaint and the General Counsel Lacked the Authority to Prosecute the Complaint.

At the time Mr. Dennis P. Walsh was appointed as the Regional Director for Region 4, the Board lacked the quorum required by Section 3(b) of the Act. See Noel Canning v. NLRB, 134 S.Ct. 2250 (2014); New Process Steel, LLP v. NLRB, 560 U.S. 674 (2010). Accordingly, the Complaint and Notice of Hearing are void *ab initio*.

3. The Revocation of Subpoenas Issued to the Union Effectively Denied the Respondent the Opportunity to Determine Whether Its Supervisors Provided Notice and the Information Sought by the Union.

The only witness presented by Counsel for the General Counsel at Hearing was Frederick DeLuca, HPAE Director of Private Sector Representation. (T. 17). Mr. DeLuca testified that he clearly understood the Hospital's position that it would not be bargaining with the Union because of the Hospital's pending challenge of the Union's certification. (T. 40-41). He also testified that he personally had no direct contact with anyone from Salem other than having met some of the Salem employees at an organizing party early on (T. 39). However, Mr. DeLuca testified that he was the supervisor of Danna Lowrie, an organizer who worked for HPAE for approximately nine months, from November 18, 2013 to August 11, 2014. (T. 17), and that Ms. Lowrie had direct contact with Salem employees. (T. 18).

Mr. DeLuca testified that the Union learned of the Hospital's intention to close the obstetrics early in January 2014 as a result of Danna Lowrie learning from Salem staff "buzz" that the unit was closing and that the Hospital's only obstetric physician was planning on retiring. (T. 36-38). Thereafter, the Union's research department obtained confirmation from the State Department of Health that the Hospital had requested permission to close the unit. But Mr.

DeLuca did not personally receive any of this information, and he did not know who, among the Hospital's employees, spoke with whom at the Union, or how often they met. (T. 37, 39). He did recall seeing information about the closure in press releases and the press prior to the Union sending an information request and demand to bargain in April 2014. (T. 43-44).

A. The Subpoenas Were Timely Requested and Sought Relevant Information.

Given that Mr. DeLuca had no direct knowledge of which Salem employees had provided information to the Union regarding the unit closure or Healthstart program, absent the testimony and documents sought by the Hospital's subpoenas, the Hospital could not elicit testimony regarding whether any of its supervisors had in fact provided notice or information responsive to the Union's requests. Although Your Honor found in the Order granting the Union's Petition to Revoke the Subpoenas that the information sought was irrelevant, Salem respectfully disagrees. Contrary to Your Honor's finding that the purpose of the information was to prove supervisory taint in the underlying test of certification case, in fact, the information was relevant to determine whether and, if so, when, the Hospital's supervisors had provided information relevant to the case at bar.

Although Your Honor determined in the Order that, absent direction of the Hospital's management, any such supervisors' notice of the closure of the Obstetrics Unit and transfer of Healthstart, and provision of the information was not relevant, again, the Hospital respectfully disagrees. It is only by learning the circumstances of such notice and provision of information that the Hospital would have been able to elicit testimony that would affect the Hospital's defense of this case. Thus, the subpoenas did not constitute an effort to litigate matters that could

have been litigated in the underlying Representation Case, but rather a good faith effort to contribute to the Hospital's defense in the case at bar.

With respect to the timeliness of the Hospital's request for the subpoenas, it is important to note that the Hospital did not know until the day of Hearing that the witness offered by the General Counsel would not have firsthand knowledge of the sources of the Union's information. There is no evidence of the Hospital having caused any delay in the Region's prosecution of this matter, and no reason for the Union to accuse the Hospital's Counsel of seeking to issue the Subpoenas as a dilatory tactic.

Consequently, the Hospital submits that its defense of this Complaint was compromised by the revocation of the Subpoenas, and respectfully submits Your Honor's Order should be reversed.

4. The Union is Not Entitled to Litigation Expenses.

The Union's call for Your Honor to disregard the generally held "American Rule" that litigation costs should not be awarded is in essence a claim that Salem did not deserve an opportunity to defend itself. The Board has found the award of litigation expenses proper only in "exceptional cases" where the party's defenses are not "debatable", but rather "frivolous." Alwin Mfg. Co., 326 NLRB 646 (1998).[3] For a defense to be frivolous, it must not merely be found to be without merit, but its contentions must be "clearly meritless on their face." Heck's, Inc., 191 NLRB 886, 889 (1971). Indeed, the award of litigation expenses is so extraordinary that the

[3] It should also be noted that the D.C. Circuit has held that the Board does not have the authority to order a Respondent to pay litigation expenses incurred by the charging party or General Counsel during an unfair labor practice proceeding. Unbelievable, Inc. v. NLRB, 118 F.3d 795, 806 (D.C. Cir. 1997).

Board has declined to make such an award even in the face of "clearly aggravated and pervasive misconduct" or "flagrant repetition of conduct previously found to be unlawful," where the defenses raised are debatable. Heck's Inc., 215 NLRB 765, 767 (1974).

In this case, the Union is arguing that Salem's failure to call any witnesses during the hearing and its issuance of subpoenas to the Union was the result of bad-faith litigation and a "frivolous" defense. The problem with this line of reasoning is not only that it is an absolutely false and baseless accusation, but also that the Board has previously declined to award litigation expenses in these exact circumstances. In Kings Terrace Nursing Home, 227 NLRB 251 (1976), for example, the Board reversed the ALJ's order to reimburse litigation expenses in a case where the Respondent did not present any witnesses. In so holding, the Board noted that it "considers many cases where respondents do not present witnesses," and that "no justification exists for penalizing Respondent because of its method of trying its case." Id. at 251. Like in the Kings Terrace decision, Salem thoroughly cross-examined the Union's witness and its decision not to call its own witness was simply part of an accepted, appropriate legal strategy.[4]

Moreover, in the case at bar, the Hospital had a reasonable expectation that the General Counsel would present a witness with firsthand knowledge of the sources of the Union's notice of, and information about, the Hospital's plans to close its inpatient obstetrics unit and transfer its Healthstart program. Indeed, the General Counsel's only witness testified that the Union had notice of, and information about, the Hospital's plans at least five months in advance of the

[4] There is also Veritas Health Services, Inc., 359 NLRB No. 111 (Apr. 30, 2013), a case admittedly in flux because it was decided during a period when the Board lacked quorum. But in that decision, the Board agreed with the Judge's denial of litigation expenses even though they found among a litany of unfair labor practices that the respondent violated the Act by "[s]erving subpoenas on employees and unions that request information about employees' union activities, under circumstances where that information is not related to any issue in the legal proceeding." Id. at *2. Thus, even though Your Honor found the subpoenas issued by Salem not to be relevant in this case, this conclusion should have no bearing on the award of litigation expenses.

implementation of the plans. (T. 38). So the Hospital's decision to seek information by way of cross-examination of the General Counsel's witnesses was not just a legitimate litigation strategy, but a common and eminently reasonable one.

The case that the Union cites for its proposition that Your Honor should award litigation expenses in this case is also inapposite. In Teamsters Local Union No. 122, 334 NLRB 1190 (2011), the Board specifically noted that "the Respondent's bad faith during negotiations **and** its continued bad faith during the litigation of the 8(b)(3) allegations fully warrant the award of litigation costs to Busch and to the General Counsel." Id. at 1194 (emphasis added). But the Union's motion seems to suggest that in Teamsters, the Board awarded litigation expenses solely because of dilatory tactics utilized by the Respondent. Even if this were the case, the facts present in Teamsters are so extraordinary as to negate any comparison between the two situations. In Teamsters, the "delay" addressed by the Board was the result of Respondent's 10-day cross-examination of the Charging Party's General Manager, which was described by the Judge as "abusive" as well as numerous other litigation strategies designed to delay collective bargaining negotiations. Id. In the case here, however, what the Union terms "delay" was only Salem's good-faith issuance of subpoenas to the Union.[5]

[5] See also SEIU United Healthcare Workers-West, 350 NLRB 284, 288 (2007) (where the Board agreed with the ALJ's refusal to award litigation expenses despite the Respondent causing unnecessary delay by refusing to stipulate that an employee was its agent and refused to make said employee available as a witness); Hotel & Rest. Employees Local 19 (Seasons Rest.), 277 NLRB 842, 848-49 (1985) (where the Board agreed with the ALJ's refusal to award litigation expenses even though counsel "acted irresponsibly by filing an answer to the complaint which necessitated proof [at a hearing at which he did not appear] in support of the complaint allegations" and where "[t]hat conduct delayed and adversely affected the 8(b)(3) rights of [the employer] and its employees represented by [the union]"); Franciscan Convalescent Hosp., 256 NLRB 510 (1981) (where the Board granted Summary Judgment but denied Charging Party's request for litigation expenses even though Respondent did not "raise any issue which is properly litigable in the unfair labor practice proceeding").

Parenthetically, it is worthy of note that, as stated by Counsel for the General Counsel at Hearing, after the D.C. Circuit Court of Appeals placed the testing of certification case in abeyance upon its own Motion, Salem did not oppose the General Counsel's Motion requesting the DC Circuit to lift its Order placing the case in abeyance and moving the case back to its calendar. (T. 12). Surely, a respondent motivated by a desire for delay would have opposed the General Counsel's Motion.

The Union also cites to HTH Corp., 361 NLRB No. 65 (2014) for the holding that litigation expenses can be awarded where a respondent asserts frivolous defenses or exhibits bad faith in the conduct of litigation. The differences between the case at bar and HTH are monumental, rendering any comparison between the cases devoid of merit. In HTH, the Respondent had a 10-year history of violations before the Board and Federal Courts that included unlawful terminations of union advocates, subcontracting for the purpose of evading collective bargaining obligations, and insisting on contract proposals that allowed the employer complete discretion with regard to wages, discipline, and major terms and conditions of employment. None of these factors or the attendant bad faith found in HTH's tactics is remotely present in the instant case.

Although the Union could make the argument that Salem failed to comply with the remedial obligations imposed by the Board in earlier appearances, like the case at bar, the related Salem cases all emanate from the seminal test of certification. The Hospital has done no more than pursue the avenues available to allow the Circuit Court of Appeals to consider and rule upon that question. Surely the Board and Courts did not intend for the punitive application of litigation expenses to be assessed each time an employer availed itself of the legal process established for challenging certification.

In conclusion, an award of litigation expenses in this case would disregard a centuries old American legal tradition of parties paying their own attorney fees. Such an award would be penalizing Salem for its use of legitimate, good faith litigation strategies that the Board has previously encountered and never found to be "frivolous", as the Union would argue. Instead, the subpoenas were issued in good faith, and, despite Your Honor's Order, at least arguably relevant for the purpose of demonstrating whether and when supervisory employees of the Hospital may have provided the Union with the information sought in the Union's letters to the Hospital's CEO. Depending on the date of such notice, Salem might have shown that the unfair labor practice charge was untimely filed. All of these possibilities are related not to the demonstration of supervisory taint in the Representation Case, but rather to supervisory communication in connection with the instant case.[6] Your Honor determined by the Order granting the Union's Petition to revoke the subpoenas that the testimony and records sought were not relevant, and the Hospital respectfully disagrees. But even Your Honor's determination does not elevate the question of the subpoenas from "debatable" to "frivolous."

Conclusion

For all of the reasons set forth herein, the Hospital respectfully submits that the Complaint should be dismissed, and that Your Honor should deny the Union's Motion for Litigation Expenses.

[6] Salem's claim of supervisory taint in the organization process was found by the D.C. Circuit to have raised a substantial issue warranting a hearing. Thus, even if Salem "fail[s] to provide sufficient evidence to support this claim, it cannot be said, in light of the court's decision, that the Respondent's claim was patently frivolous." Eliason Corp., 270 NLRB 14, fn. 5 (1984).

Respectfully submitted,

_/s/_____
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Dated: February 18, 2015

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BEFORE THE NATIONAL LABOR RELATIONS BOARD
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HEALTH PROFESSIONALS AND ALLIED EMPLOYEES, AFT / AFL-CIO Charging Party	)	

CERTIFICATE OF SERVICE

The Undersigned, Carmen M. DiRienzo, being an Attorney duly admitted to the practice of law, does hereby certify, pursuant to 28 U.S.C. § 1746, that the Respondent's Post-Hearing Brief in the above-captioned case was e-filed through the NLRB website at www.NLRB.gov on February 18, 2015 with the following:

Hon. Susan Flynn, Administrative Law Judge
NLRB Division of Judges
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The Undersigned does hereby further certify that, on February 18, 2015, a copy of the Post-Hearing Brief was served by email upon the following:

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Dated: Katonah, NY
February 18, 2015

Respectfully submitted,

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